QUESTION PRESENTED

Does the Establishment Clause prohibit local governments from the exhibition of religious symbols as holiday displays if the displays are located on public land and are not subsumed by other non-religious symbols?

INTEREST OF THE AMICUS CURIAE

The City of Warren ("Amicus Curiae") is a municipal corporation in the State of Michigan. For many years, the City of Warren has erected a holiday display on the front lawn of the Warren City Hall during the month of December, which includes a creche, menorah, Star of David, toy soldiers, a snowman, candles, and stars. In response to a lawsuit challenging the religious components of the display as a violation of The Establishment Clause of the U.S. Constitution, U.S. District Judge James Harvey, on October 20, 1988, denied a motion for a preliminary injunction to preclude inclusion of the creche and the menorah in the holiday display. *Jane Doe, et al.* v. *The City of Warren*, slip op., Civil Action No. 87-30084, (E.D. Mich, 1988). Judge Harvey ruled specifically that the inclusion of the creche, the menorah, and the Star of David in the display was constitutionally permissible. Despite this favorable result, the City of Warren believes that the present case before this Court may very well determine whether the City may continue its long-established practice of acknowledging the origins of the Christmas and Hanukkah Holidays. The City's firm conviction is that the inclusion of these symbols in its holiday display in no way places its imprimatur on any particular religious belief.

STATEMENT OF THE CASE

Amicus Curiae adopts and incorporates by reference the statement of the case appearing in the brief submitted by the petitioner, City of Pittsburgh.

SUMMARY OF THE ARGUMENT

The Court of Appeals should be reversed for its refusal to apply the principles already established by this Court in

Lynch v. *Donnelly*. Rather than follow the guideposts established by this Court in *Lynch* v. *Donnelly*, the Court of Appeals attempted to carve out a new and contrary course through the constitutional landscape. This Court should repudiate such attempts by lower courts to ignore the dictates of *Lynch* under the guise of artificial factual distinctions.

However, should this Court depart from the reasoning of its prior rulings and hold that religious holiday displays, standing alone, do not pass constitutional muster, Amicus Curiae would urge the Court not to preclude local governments from celebrating major holidays through the use of displays containing both religious and non-religious components, as was involved in the *Lynch* case. Otherwise, a blanket ban on the use of religious symbols in holiday displays on public property would convey an unfortunate message of government hostility toward religion.

I.

THE COURT OF APPEALS' REFUSAL TO APPLY THE PRINCIPLES ESTABLISHED IN LYNCH REQUIRES REVERSAL.

The Court of Appeals in this case offered little more than a token glance at this Court's decision in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984). Instead, the Court of Appeals seized upon artificial factual distinctions as a means to ignore the clear dictates of the *Lynch* decision. The Court of Appeals' primary stated justification for sidestepping *Lynch* was two purported factual "distinctions": 1) the location of the creche and menorah at or near a public building devoted to the core functions of government and 2) the fact that neither the creche nor the menorah were "subsumed by a larger display of non-religious items." *American Civil Liberties Union* v. *County of Allegheny, et al.*, 842 F.2d 642, 655 (3rd Cir.

1988). A careful reading of *Lynch* and this Court's other Establishment Clause cases makes evident that neither of these purported factual "distinctions" precludes the petitioners from continuing their laudable efforts to acknowledge the religious heritage of their community.

A. The Lynch Case: The Facts, the Holding and the Establishment Clause Test Applied.

The *Lynch* case involved a city-owned holiday display located in a private park in the heart of the city's shopping distict. *Lynch*, 465 U.S. at 671. The display included a creche and a number of other non-religious symbols. *Id.* This Court held in *Lynch* that the city's use of the creche in the display was a permissible means for the city to acknowledge the religious origins of Christmas in a manner which did not violate the Establishment Clause of the First Amendment. *Lynch*, 465 U.S. at 681–687.

Though applying the familiar three-part *Lemon* test often used by this Court in Establishment Clause cases,[1] the Court in *Lynch* emphasized that its central concern in such cases was whether "in reality", the challenged official conduct "establishes a religion or religious faith, or tends to do so." *Lynch*, 465 U.S. at 678. In a concurring opinion, Justice O'Connor also noted that an appropriate concern was whether or not the challenged government conduct conveyed a message of government endorsement or disapproval of religion. *Lynch*, 465 U.S. at 688–694.[2]

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[1] The three requirements of the *Lemon* test are as follows:

> First, the [governmental conduct] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . ; finally, the [conduct] must not foster 'an excessive government entanglement with religion.'

Lemon v. *Kurtzman*, 403 U.S. 602, 612–613 (1971).

[2] In other contexts, Justice O'Connor has stated that the relevant test is whether an "objective observer" would view the government's conduct as conveying a message of endorsement of a religion or a particular religious belief. *Wallace* v. *Jaffree*, 472 U.S. 38, 76 and 83 (1985); *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. ____; 97 L.Ed.2d 273, 291 (1987).

B. The Private Land/Public Land Distinction Was Irrelevant to the Lynch Analysis and Constitutes an Improper Basis for Departing From the Lynch Decision.

The Court of Appeals attempted to distinguish *Lynch* by focusing on the fact that the creche and menorah were located on public land. This decision of the Court of Appeals ignores the holding and rationale of *Lynch* on several points. First, the *Lynch* decision was written with the understanding that the City of Pawtuckett display was "essentially like those to be found in hundreds of towns or cities across the Nation — *often on public grounds* — during the Christmas season." *Lynch*, 465 U.S. at 671 (emphasis added). It is abundantly clear that Court of Appeals' reliance upon the public land /private land distinction was more a result of an obedient reading of Justice Brennan's dissenting opinion in *Lynch* than close scrutiny of the analysis of this Court's opinion in that case.

Second, this Court's heavy reliance upon the *Marsh* case[3] in its *Lynch* decision dispels any notion that the location of the creche and menorah in or near a government building is sufficient excuse to ignore the *Lynch* decision. In *Marsh*, this Court held that the legislative practice of hiring a legislative chaplain who opened each session of the Nebraska legislative with prayer did not violate the Establishment Clause. In *Lynch*, Chief Justice Burger's opinion referred directly or indirectly to the *Marsh* opinion no less than seven times. *Lynch*, 465 U.S. at 674, 679, 682–683, 685–687. In addressing the "effect" prong of the *Lemon* test, the only prong of the test the petitioners were found to have violated in this case,[4] 842 F.2d at 662, the *Lynch* Court held that the creche display conferred no more benefit upon religion, than "the legislative prayers upheld in *Marsh* v. *Chambers*". *Lynch*, 465 U.S. 668, 681–682. In its concluding remarks in *Lynch*,

[3] *Marsh* v. *Chambers*, 463 U.S. 783 (1983).

[4] Since the Court of Appeals did not rule on whether the first or third prongs of the *Lemon* test were violated, this brief will not address them.

this Court did not hesitate to use the *Marsh* case as a benchmark for testing the constitutional validity of government-sponsored religious displays:

> To forbid the use of this one passive symbol — the creche — at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains would be a stilted overreaction contrary to our history and to our holdings. If the presence of the creche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.

Lynch, 465 U.S. at 686.

It strains credibility to believe that a privately-owned creche or menorah displayed in or near a government building represents a greater danger of state-established religion than a legislative chaplain. If an "objective observer"[5] would perceive no message of government endorsement of a particular religious belief in a legislative chaplain offering Judeo-Christian prayers[6] from the same legislative chambers from which legislative debates are held then surely that same observer would perceive no such government endorsement in the silent display of the creche and menorah in the entrance of the Allegheny County Courthouse or on the steps of the Pittsburgh City-County Building.[7] Given any different perception, one might question the observer's need for corrective lens.

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[5] Wallace, 472 U. S. at 76 and 83; *Amos*, 97 L Ed 2d at 291 (O'Connor J., concurring)

[6] See *Marsh*, 463 U.S. at 793.

[7] The appearance of government endorsement of religion is certainly further diminished by the fact that the creche and the menorah are privately owned and, at least in the case of the creche, are identified as such. Cf. *Widmar* v *Vincent* 454 U. S. 263, 273–275 (1981); *McCreary* v *Stone*, 739 F.2d 716, (2d Cir. 1984) aff'd by equally divided court sub nom *Bd. of Trustees of Village of Scarsdale* v *McCreary*, 471 U.S. 83 (1985); *Smith* v *Lindstrom*, slip op. Civil Action No. 87-0068C (W.D. Va. 1987) (denying injunction against privately owned creche display on lawn of County Office Building.)

In the present case, mention of the *Marsh* decision is conspicuously absent from the Courts of Appeals' criticism of the symbolic union of "City Hall" and religious symbols. 842 F.2d at 660–662.[8] The Court of Appeals' failure to address *Marsh* was no doubt one of the several reasons for its erroneous conclusions.

Third, this Court in *Lynch* cited many other examples besides legislative chaplains where government has acknowledged our religious heritage and sponsored "graphic manifestations of that heritage." *Lynch*, 465 U.S. at 677. The Court's illustrative list included the designation of Thanksgiving as a national holiday and subsequent presidential Thanksgiving proclamations, the congressionally-mandated use of "In God We Trust" on U.S. coins, the exhibition of hundreds of religious paintings in The National Gallery, the use of the phrase "One Nation Under God" in our Pledge of Allegiance, the congressionally-mandated proclamation of a National Day of Prayer each year, and Presidential Proclamations commemorating Jewish Heritage Week and the Jewish High Holy Days. *Lynch*, 465 U.S. at 675–677. In almost all of these examples the government acknowledgment of religion took place either in a government building or emanated directly from a government actor.

Fourth, the private land versus public land distinction might carry more weight if this Court in *Lynch* had treated the placement of the creche in a private park as transforming *government* sponsorship of the creche into merely *private* sponsorship. However, the creche in *Lynch* was treated unequivocally by this Court as a *government-sponsored* display. That display was placed in a "central and highly visible location" in the heart of the shopping district. *Lynch*, 465 U.S. at 671; *Lynch* 465 U.S. at 706 (Brennan J., dissenting). There was no

[8] Discussion of the *Marsh* case is likewise conspicuously absent from the other Court of Appeals' decisions which have held invalid, on Establishment Clause grounds, creche displays in or near public buildings devoted to core governmental functions. See e.g. — *American Civil Liberties Union* v. *City of Birmingham*, 791 F. 2d 1561 (6th Cir.), cert. den. 479 U.S. 939 (1986); *American Jewish Congress* v. *City of Chicago*, 827 F.2d 120 (7th Cir. 1987).

suggestion in *Lynch* that the creche was perceived as a private display because of its location in a private park. Neither was there any hint in *Lynch* that government may acknowledge our religious heritage only if the public might be under the mistaken impression that a religious display was sponsored by a private party.

To the contrary, the *Lynch* Court merely condoned the creche display as one of many constitutionally permissible ways in which government may acknowledge our rich religious heritage. The geographical location of the religious display was all but irrelevant to the *Lynch* analysis of the constitutional validity of the display. Furthermore, this Court's reliance on *Marsh* and other similar examples makes evident that the location of a religious display in or near a governmental building would in no way diminish its permissibility.

Fifth, the Court of Appeals in this case gave microscopic scrutiny to the possible perception of government endorsement of the creche and the menorah. No scrutiny was given to the message conveyed by a ban on the use of religious symbols in holiday displays in or near government buildings. Amicus Curiae is not alone in its belief that the tragic message that would be drawn from such a ban would be government hostility toward religion. *See e.g.* — *Citizens Concerned for Separation of Church and State* v. *City and County of Denver*, 526 F.Supp. 1310, 1314 (D. Colo. 1981).

II.

WHILE THE FACT THAT THE CRECHE AND MENORAH WERE NOT SUBSUMED BY NON-RELIGIOUS ITEMS IN THE DISPLAY DOES NOT AFFECT THE CONSTITUTIONALITY OF THE DISPLAY UNDER LYNCH, IF THE COURT HOLDS OTHERWISE, IT SHOULD NOT EXTEND ITS RULING TO DISPLAYS WHICH INCLUDE SECULAR SYMBOLS AS WELL.

The Court of Appeals attempted to distinguish *Lynch* on the basis that the creche and menorah were not "subsumed by a larger display of non-religious items." 842 F.2d at 662. This adorned/unadorned distinction has been lampooned as a "Two Plastic Reindeer" rule or a "St. Nicholas, too" test which requires the courts to determine how many secular items in a holiday display are sufficient to neutralize the religious aura of the religious component of the display. 842 F.2d at 668–669 (Weiss J., dissenting) (citations omitted). The *Lynch* case does not require that any such determination be made. This Court should reject the suggestion that local governments must surround religious displays with secular symbols in order to legitimately acknowledge our religious heritage.

In the *Lynch* case, this Court refused to limit its focus to the components of the holiday display itself but rather viewed the creche display in the broader context of the Christmas season. This court stated in *Lynch* that "the focus of our inquiry must be on the creche in the context of the Christmas season." *Lynch*, 465 U.S. at 679 (citations omitted). The Court's focus in *Lynch* was broad enough to take into account public efforts in celebrating Christmas beyond those taken by the government entity sponsoring the religious display:

> To forbid the use of this one passive symbol — the creche — *at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places*, and while the Congress and

> legislatures open sessions with prayers by paid chaplains would be a stilted overreaction contrary to our history and to our holdings. If the presence of the creche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.

Lynch, 465 U.S. at 686 (emphasis added).

This Court's analysis in *Lynch* indicates that the widespread public celebration of both the secular and religious aspects of Christmas contributed to the fact that the display of the creche resulted in only an "indirect, remote and incidental" benefit to religion. *Lynch*, 465 U.S. at 683. Justice O'Connor, in her concurring opinion, also noted that the "overall holiday setting," though not neutralizing the religious content of a religious display, "negates any message of endorsement." *Lynch*, 465 U.S. at 692.

Similarly, in the present case, the creche, when viewed in the context of the holiday season and the county-sponsored Christmas carol programs with their secular and religious carols, benefitted religion in only an "indirect, remote, and incidental" fashion. *Id.*, See also 842 F.2d at 657. The fact that the creche or the menorah is "identified with one religious faith" does not render either display constitutionally infirm any more so that the choice of a legislative chaplain from one denomination or the codification of the Sunday Closing Laws. [9] *Lynch*, 465 U.S. at 685–686.

The notion that a government's decision to symbolically acknowledge a particular religion's heritage requires simultaneous acknowledgement of sufficient secular symbols to neutralize the potential religious impact of those symbols runs contrary to the numerous examples offered by this Court in *Lynch* reflecting government acknowledgement of our

[9] See *Marsh*, 463 U.S. at 763 ("we cannot . . . perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church"). See also *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

religious heritage and governmental sponsorship of graphic manifestations of that heritage. *Lynch*, 465 U.S. at 674–678. For example, if such "neutralization" efforts were truly required, then it would be necessary to drape legislative chaplains with some sort of secular paraphernalia or a sandwich sign disclaimer to vitiate the potential religious impact of their prayers. Given our country's history and this Court's holdings, local governments should not be required to engage in such attempts to cover up the religious origins of some of the holidays our country recognizes and celebrates.

Amicus Curiae believes that while, under this Court's prior holdings, the addition of secular symbols to religious holiday displays is not necessary to pass constitutional muster, it would be preferable for this Court to require the addition of secular symbols than to preclude completely the use of any religious symbols in holiday displays on public property. A total ban on the use of religious symbols in holiday displays on public property would be widely perceived in communities like Warren, Michigan and other similar communities as government hostility toward religion, not government neutrality. See, e.g. — *Citizens Concerned for Separation of Church and State* v. *City and County of Denver*, 526 F.Supp. 1310, 1314 (D.Colo., 1981). The alienation of citizens whose religious heritage must be systematically ignored in favor of purely secular symbols in government holiday displays is no less intense than that of citizens who feel some discomfort with the presence of religious symbols in such displays. The perceived effect of such a systematic exclusion of religious symbols is that of government "preferring those who believe in no religion over those who do believe." *Zorach* v *Clauson*, 343 U.S. 306, 314 (1952). Religious tolerance is chilled, not engendered, when government shows such "callous indifference" toward religion. *Lynch*, 465 US at 673 (citations omitted).

Amicus Curiae concedes that for some the addition of non-religious symbols to holiday displays may mitigate their perception of government endorsement of religion. The City

of Warren, like many other communities with holiday displays containing both religious and non-religious components, would gladly retain the non-religious symbols as a reasonable accommodation of those who perceive improper government sponsorship of religion in religious displays standing alone.

CONCLUSION

Accordingly, Amicus Curiae urges this Court to reverse the judgment of the Court below.

Respectively submitted,

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CONSENTS

Written consent of all parties to this case have been obtained by Amicus Curiae, the originals of which accompanied the filing of this brief.